UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SONY MUSIC ENTERTAINMENT, et al., Plaintiffs,	
-vs-	Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al., Defendants.	

HEARING ON MOTIONS

December 21, 2018

Before: John F. Anderson, U.S. Mag. Judge

APPEARANCES:

Matthew J. Oppenheim, Scott A. Zebrak, and Jeffrey M. Gould,
Counsel for the Plaintiffs

Thomas M. Buchanan and Jennifer A. Golinveaux,
Counsel for the Defendants

NOTE: The case is called to be heard at 10:47 a.m. as follows:

THE CLERK: Sony Music Entertainment, et al. versus Cox Communications, Inc., et al., civil action number 18-cv-950.

THE COURT: You need to introduce yourselves for the record.

MR. ZEBRAK: Good morning, Your Honor. Scott Zebrak of Oppenheim + Zebrak, counsel for the plaintiffs. And with me today are my colleagues Matthew Oppenheim and Jeffrey --

MR. OPPENHEIM: Good morning, Your Honor.

MR. ZEBRAK: And Jeffrey Gould. And Matthew Oppenheim will be arguing on behalf of plaintiffs today.

THE COURT: Okay, thank you.

MR. BUCHANAN: Good morning, Your Honor. Thomas Buchanan on behalf of the defendant Cox. With me today is my partner, Jennifer Golinveaux, from our San Francisco office.

THE COURT: And who is going to argue for Cox.

MR. BUCHANAN: I will be arguing, Your Honor.

THE COURT: Thank you, Mr. Buchanan.

Okay. Well, just one thing. If the parties throughout -- you can go ahead and have a seat. If the parties intend to take advantage of the expedited briefing schedule on any motions in this case, the party filing the motion who makes the decision to do that has to be prepared to file a reply

before the close of business the day before the motion gets filed.

You know, the idea of filing a reply at 6 o'clock on Thursday when the motion is being heard at 10 o'clock on Friday morning, isn't very practical. And it was, you know, the moving party's decision to do the expedited briefing schedule. And so, if you decide to do that, you need to be prepared to file a reply in a time period in which the Court has time to consider it before the argument.

I don't need to hear any response. This goes for both sides. So I suspect this isn't the motion -- only motion I'm going to be hearing in this case, and I want to try and set the ground rules now so that we don't run into this going forward.

You know, I have had an opportunity to review all the pleadings, and I understand they're -- while it gets raised as two issues, it really is four issues that are in front of the Court: The trial exhibits, the public trial exhibits; the fact witnesses; the expert witness depositions; the answers to interrogatories; and then the copyright notice issue.

I'm going to do it a little bit piecemeal. I am going to hear argument from the plaintiff first on the trial exhibits, hear any response from the defendants that I think is necessary, and then I will take up the other issues separately or together. We will see how that works out. Okay?

So let's hear about the trial exhibits first.

MR. OPPENHEIM: Very well. And thank you, Your Honor.

As Your Honor no doubt understands from having reviewed the filings, this case is closely related to the BMG versus Cox case that was previously before this Court.

The plaintiffs in this case are a number of record companies and music publishers, they have brought secondary infringement claims against Cox. Both cases involved both contributory and vicarious liability claims. And the theories of the cases were largely the same, which were that Cox's --

THE COURT: This case is different. I mean, this is not a case in which you had the settlement demands that were put in the notice and Cox cut them off. I mean, so the facts and circumstances are not the same. You're right, the legal theory is the same, the defendant is the same. The plaintiffs are different and the copyrighted works are different.

MR. OPPENHEIM: No doubt that is true, Your Honor. The claim, the underlying theory in the Rightscorp --

THE COURT: The point I need to have you address is, why do you need the public trial exhibits from the BMG case? And what efforts did you get to get them either from the Clerk's Office here or the Fourth Circuit? I mean, I assume that all the trial exhibits were part of the record on appeal to the Fourth Circuit.

MR. OPPENHEIM: Your Honor, I actually attended and observed, as did my colleague, good portions of the trial when it occurred. And immediately after the -- or I shouldn't say immediately. Within weeks of the verdict being rendered, we reached out to the court reporter to get not only the full transcript of the case, of the trial, but all of the exhibits. Obviously the court reporter didn't have the exhibits.

We reached out to the court clerk. The court clerk didn't have the exhibits.

We reached out to Judge O'Grady's clerk to see if we could get a copy. Everybody said to us we needed to reach out to the parties, nobody had it.

We have been asking Cox for the exhibits from before this case was even filed, and they have refused to give it to us.

Frankly, Your Honor, this shouldn't be a discovery request. This was a public trial with a public record. Those exhibits are part of the public record. And I actually think that the Rambus decision that we cited in our motion is directly on point. Actually, that case goes even further than we need it to go. That was a case that involved demonstratives, I believe, on an argument, not on a trial.

Here, this was a public trial on a case that whether it had slightly different notices or not, with the same defendant on the same theory of continued provision of service

to known infringers. And all we want to do is get the exhibits.

Judge O'Grady in deciding the transfer motion that Cox brought, and in rejecting it, recognized that there would be great efficiencies in having this case before this Court.

THE COURT: You're going to have to plow your own road in this case.

MR. OPPENHEIM: No doubt.

THE COURT: And, you know, the idea that, you know -- well, you're going to have to plow your own road in this case. But the issue with the trial exhibits I think is different than other discovery matters, and that's why I want to take this one up separately because I think there are other considerations there.

MR. OPPENHEIM: I do agree, it is different. I believe the other -- there are other arguments on the other issues. But on this, this was a public trial, these are supposed to be part of a public record. What part of stare decisis in our judicial system is public if the exhibits aren't available?

And this is not some instance where we're seeking them for some improper purpose. We're seeking them because they are directly related to what we want to put forward before this Court.

The defendants are acutely aware of them. They have

all of these exhibits. They are going to rely on these exhibits. They are going to rely on that transcript. We should have the same level playing field here, Your Honor.

THE COURT: Okay. Mr. Buchanan, let me hear from you on the public trial exhibits. And one of the things that -- and I went back to look at the record in the first trial -- and I know you weren't involved in the first trial. But as you know, it's not uncommon for cases, once they are completed, for the Court to release the exhibits to the parties with the understanding that the parties would be retaining those exhibits for any purposes.

The docket sheet doesn't reflect that was actually done in the first trial, but I suspect if the Clerk's Office says, we don't have the exhibits, then the exhibits were probably released to the lawyers.

Do you know whether that is in fact the case or not?

MR. BUCHANAN: I think that's true. I believe -- I believe it was true. And I think it went to the other lawyers that represented them in the first trial.

But if I could maybe address that. The plaintiffs seem to suggest that all they have to do is ask for something, say it's available, and they get it. But there is a standard to establish if it's reasonably particularly relevant to the case. They've never, you know, pointed that out.

And I would say, they had all the pleadings in that

case since 2005. They attended the trial. They have had all the trial testimony. They have had the post-trial cites. So what is it they want?

So in that case you have copyrights and proof of copyright ownership that have no relevance to this case. You have proof of infringement by Rightscorp, has no relevance to this case. Notices from Rightscorp. Contracts between Rightscorp and BMG. BMG contracts. Rightscorp's discussions with us. It is not in any way relevant.

What we have said is, you have the transcript, you now have seven of the ten fact witnesses' deposition transcripts and exhibits. We're giving the other three today. Between all of those exhibits and all that testimony and the trial testimony, you can identify within the trial transcript a particular exhibit that you believe you want and we will address that and probably produce it.

But the notion that we're going to produce 20 boxes of copyrights and proof of copyrights, all these dealings with Rightscorp, and their code and methodology, I mean, that is just not relevant. We don't want to go down that road because it creates mischief. Because then we lead to discovery and they have got all this stuff and they're asking every witness about all these things, and we are going to relitigate that case. And that's what we want to avoid.

So that's what we proposed as a solution. You can go

through the transcript, find an exhibit, it is described. If you want that and we haven't given it to you -- they're probably going to get it all.

In fact, in their response -- their reply brief they emphasize they want the methodology we used and the practice and procedures and those witnesses. That's all contained in either the trial transcript or the depositions and exhibits we gave them. It's all in there, all the factual information that is relevant to Cox and how they dealt with notices.

THE COURT: Okay. All right. Well, I think I understand this issue. It was fairly fully briefed.

And again, I want to make sure the parties understand, I'm considering this one as a different issue necessarily than discovery-related materials in the first -- the BMG trial. I mean, I think -- my ruling is going to be that the public trial exhibits and the demonstratives should be made available for their inspection and copying. So if you're concerned about, you know, the amount of copying that needs to be done, then you can make arrangements for them to come in and decide whether they want the, you know, copyright registrations that were produced by BMG produced in this case.

I mean, obviously, that doesn't seem to be anything. But the one thing I don't want us to have to be doing is coming in here every week and arguing whether this trial exhibit was relevant or not relevant and having a mini-trial as to what is

relevant and what isn't.

Given the public nature of the trial, given that typically in this court the lawyers retain the exhibits with the understanding that if there is a need for them to be produced, either in the Fourth Circuit or somewhere else, they will make them available, I am going to require that the public trial exhibits and the demonstratives be produced.

All right. You're producing the three fact witnesses' depositions --

MR. BUCHANAN: Just to -- Judge, if I may, you said to produce. Does that mean that we make it available for them to inspect and copy?

THE COURT: If that's the process that you want to do, then -- you know, obviously, they can follow the same course and any document requests that you have, they can then say, you can come to our offices and look at them and decide what you want copied or not. I mean, that's what the rules indicate --

MR. BUCHANAN: Right.

THE COURT: -- you know, the parties can do. The question is what's the practical approach to that. And you all should start trying to work together a little bit on this and not just put up roadblocks for certain things.

I mean, obviously -- I mean, from my review of what was produced, there are probably nine boxes of exhibits, if I

read the -- what was delivered to the Clerk's Office prior to the first trial, something in that range, if you look at the docket sheets. So that isn't an enormous amount of paper to be produced to one side or the other. But you all -- you all can work on the details of that. But ...

So on that issue, I am going to at least grant in part that part of the motion.

The fact witnesses, you've produced or will be producing the Cadenhead, Vredenburg, and Dameri transcripts of those three fact witnesses; is that correct?

MR. BUCHANAN: Yes.

THE COURT: Okay, all right. All right. Well, I will hear the argument on the fact witnesses, expert witnesses, and interrogatory responses now from the plaintiff.

MR. OPPENHEIM: Yes, Your Honor. I don't want to direct a question to opposing counsel, but maybe this, on the fact witnesses, it would short circuit it.

I am not sure, but I may have heard opposing counsel to say that they have produced seven out of the ten fact witnesses and they plan on producing the other three today? If that's what he said, then the fact witnesses issue is resolved. Maybe I misheard him.

MR. BUCHANAN: Correct.

MR. OPPENHEIM: So they're -- so it sounds like, Your Honor --

THE COURT: Okay, all right.

MR. OPPENHEIM: -- they are agreeing to produce the fact witnesses.

THE COURT: Okay.

MR. OPPENHEIM: So with Your Honor's permission, I will move on to the experts.

THE COURT: You have got the expert testimony --

MR. OPPENHEIM: Yes.

THE COURT: -- that was presented in the trial. You will have all the exhibits that were introduced into trial relating to the expert witnesses.

Help me understand why you think you're entitled to get the deposition transcripts of these expert witnesses.

MR. OPPENHEIM: So, Your Honor, unlike the fact witnesses where we identified three specific witnesses just as representative, here we actually identified four expert witnesses. And that's the -- that's the deposition testimony we want. We're not looking to go beyond those four.

And the reason we identified those four, which include Ms. -- or I should say probably Dr. Frederiksen-Cross -- I must admit, I can't remember whether misters or doctors, but Lehr, McGarty, and Sullivan. So those are the four witnesses. All four of those witnesses, Your Honor, provided testimony that was -- is related to the facts that are going to be at issue in this case.

So, for instance, Frederiksen-Cross provided testimony directly on how -- how they analyzed the Cox Copyright Alert System, how it worked. And so, the deposition testimony will speak to the analysis of how that system worked and what issues were raised by that.

Similarly, Lehr provided testimony with respect to Cox's financial benefit from infringement. Again, an issue in our case.

McGarty provided testimony on the limitations of the Copyright Alert System that Cox had developed and what a responsible ISP could do. Again, an issue in our case.

And Sullivan provided testimony on the effects of the infringement on Cox, and on the issue of damages as it was associated from copyright in that case. Again, an issue in our case.

So these four witnesses, their testimony on those issues having reviewed the Cox factual evidence on these issues, provided testimony on them in deposition. They were cross-examined.

We may well use some of the -- or all of these witnesses, Your Honor. And we would want to now how they had testified previously. Those witnesses can't necessarily turn those depositions over to us. I don't know that they even have them, to be honest. But we want to be on a level playing field where we can see what those witnesses said --

THE COURT: Wouldn't any expert have to keep their deposition testimony? They at least have to identify that in any 26(a)(3) disclosure, right?

MR. OPPENHEIM: Certainly they would have to identify it, I agree with that, Your Honor. I don't know whether they have it.

We need to get past the threshold of the relevance to deal with -- there is a protective order issue. I acknowledge there is a protective order issue. We can get to that issue, but only after Cox puts aside its objection on the basis of relevance.

THE COURT: Okay. All right.

MR. OPPENHEIM: So -- and we believe the protective order issue can be resolved through normal processes. This Court has the ability under the protective order to order its production. We can give notice and get consent, or simply be -- allow BMG to be heard, Your Honor.

THE COURT: Okay.

MR. OPPENHEIM: So I believe that issue is resolved.

THE COURT: What about the answers to the interrogatories, why do you think you're entitled to those? All the interrogatory entrances, just one request, give me every answer to every interrogatory.

MR. OPPENHEIM: The problem is, Your Honor, we don't have the list of the interrogatories that were issued such that

we could say, we want interrogatories 1, 8, 9, 12, and 13.

All we know is that there were interrogatories issued in that case to Cox on issues that are no doubt directly related to the issues in our case. They are prior sworn statements on those issues.

To the extent that some of those interrogatories may have gone to the issue of, for instance, BMG's copyrights, we obviously don't have an interest in that limited subset, but we are not in a position, because we haven't been given what the interrogatories are, to be able to pick and choose.

So this is not burdensome on their part. And we're happy to weed through whatever is not relevant because we suspect that it is very little, Your Honor.

THE COURT: All right. Well, on that issue, I am going to deny the motion to compel both the fact -- well, the fact witnesses I hope have been resolved, so that one is moot.

I think going beyond what the trial testimony was on the expert witnesses, you now have whatever exhibits were used with the expert testimony, going back and going into the core discovery that was done in the earlier case really is not appropriate under the circumstances of this case.

Your going to, as I said earlier, have to plow your own road. If you want to decide to use an expert witness, you need to contact that expert witness. You don't get to do a dry run in seeing what they did in a deposition before you do that.

So I'm going to deny the motion as to the expert witnesses.

I'm also going to deny the motion as to the answers to interrogatories. That really isn't a particularized document request. I mean, you're asking for them to produce information that is -- you don't really know what it is.

And so, you know the idea that I want to get all of their answers to interrogatories in another case that -- and, you know, I think if you look at the record in the BMG case, you would probably find that the interrogatories were part of motions to compel that were filed in that case and would be available for you to look at and make particularized requests.

So I'm denying the motion as to the deposition testimony other than what Mr. Buchanan has indicated he will be providing to you today in the answers to the interrogatories.

MR. OPPENHEIM: May I ask two questions, Your Honor?

With respect to the expert deposition testimony, should we choose to retain any of these experts, will the defendants be allowed to use those transcripts to impeach the witnesses?

And at that point in time, if we retain them, will we be -- have the right to revisit this issue with the Court?

THE COURT: Well, if you retain an expert witness, I suspect you will have that expert witness' deposition transcript. If that's an issue that you are unable to get that

expert witness' deposition transcript, come back to me and I'll see that you're able to get that.

So if you hire Dr. Sullivan to come in and testify in your case, and he can't provide you with a transcript of his deposition that he had to look at and sign before it was, you know, submitted to the parties, then come back and I will talk, we will figure out why you didn't get a copy of that or whatever releases need to be signed in order for you to do that.

MR. OPPENHEIM: Your Honor, we've already spoken to several of these experts. And they have indicated that because of the protective order, that they were uncomfortable giving us copies of the transcript. That's why we're here today.

So without prejudice, we can revisit this issue if it arises, Your Honor?

THE COURT: Okay, without prejudice, yes, sir.

MR. OPPENHEIM: With respect -- sorry. With respect to the interrogatories. I just want to make sure I understand.

To the extent that we, for instance, issued a document request asking for prior sworn statements regarding Cox's CATS system, their Copyright Alert System, or prior sworn statements regarding top, certain topics, Your Honor is not ruling on that at this point?

THE COURT: No. I'm ruling on the motion to compel. The motion to compel was relating to their answers to

interrogatories. So I am denying the motion to compel on that issue.

MR. OPPENHEIM: Very well, Your Honor.

THE COURT: Okay. Let me hear your argument on the all copyright notices from January 2010 to December 31, 2014.

MR. OPPENHEIM: So, Your Honor, our legal theory in this case is that Cox knowingly provided Internet service to subscribers for whom Cox knew that the subscribers were engaged in infringement.

The Fourth Circuit's opinion in the BMG case said that the question in these types of cases is: Did Cox know it's subscribers were infringing and could it do something about it?

The question of whether or not those notices came from the plaintiffs is irrelevant. The question is whether or not Cox had knowledge.

THE COURT: Well, that has to be knowledge of someone who infringed your client's copyrights, right?

MR. OPPENHEIM: So that --

THE COURT: I mean, you only have standing to sue for someone who infringed your clients' copyrights?

MR. OPPENHEIM: Of course, Your Honor. There are three elements in a contributory claim, Your Honor: The underlying direct infringement. That underlying direct infringement, there has to be evidence of it. The evidence in

this case will come from the notices that our clients sent.

But the issue of knowledge as to whether or not a particular subscriber -- that Cox knew that a particular subscriber was infringing, could have come from anybody.

Let me give you an example, Your Honor --

THE COURT: But that's not what you're asking for, and that's not what you're asking me to order Cox to produce.

MR. OPPENHEIM: No, respectfully, Your Honor, I think that is precisely --

THE COURT: Well, that's a part of it, but not all of it. You're asking this Court to order Cox to produce every copyright or every notice of infringement that it got for a five-year period no matter who sent it or who the subscriber was, or whether that subscriber had any relationship with your clients.

MR. OPPENHEIM: Absolutely, Your Honor. It goes to two elements. First, the notices, whether they came from the motion picture studios, whether they came from software companies, photo companies, you name it, go to Cox's knowledge that particular subscribers were infringing.

But it also goes to willfulness, Your Honor. If Cox received 10 million notices and was doing virtually nothing on it, on the issue of willfulness, a jury should get to hear that.

THE COURT: Okay. Well, help me understand how it's

proportional for them to produce 10 million notices as opposed to you finding out a number of infringing notices as opposed to the actual notices themselves?

MR. OPPENHEIM: Your Honor, I believe that the issue of whether or not they produced the actual notice versus a database of the notices they received is an issue we never got to because the defendants just hard-lined: It's irrelevant, we're not going to have a discussion about it.

The defendants have acknowledged to us they have a database of what those notices are. We don't need the actual notices. The database that shows those notices is likely to be sufficient and not burdensome.

But I will say that the affidavit that was put forward as to the burden in the context of this case, where it is virtually the entire music industry on a critical issue of infringement involving almost 11,000 copyrights, the fact that it takes several days of engineering time and then computing power, is not burdensome and certainly is proportional.

Computing time, by the way, is just a function of how --

THE COURT: It's only proportional if it -- how it relates to an issue that is in this lawsuit. And if the issue in this lawsuit relates to they had tens of thousands or millions of copyright infringement notices sent to them, you know, that's one thing.

But having them produce the actual notices, which is what you've asked for in document request number 11, is a different set of circumstances. So it has to be -- you weigh the burden as to what is the information that is needed in order to prepare a claim or a defense and weigh that.

And the idea of, you know, providing 10 million or however million notices, just because you want to sit there and count them up and say they got 10 million notices in the past, makes your request not proportional.

MR. OPPENHEIM: Your Honor, we've produced well over 200,000 --

THE COURT: Well, I --

MR. OPPENHEIM: If I may, Your Honor, 200,000 notices. If a particular subscriber -- if we sent a notice on a particular subscriber with a particular IP address right here, but we only sent one notice on that subscriber, and that's all we have to rely on, Cox will say, well, we only received one notice as to this subscriber.

If they receive 1,000 notices on that subscriber from other copyright owners, suddenly the -- before ours, suddenly that one is critical. And it shows that they knowingly provided service to a known infringer on a specific infringement.

So, Your Honor, what we want to do is be able to do that analysis. They have a database, they track this. They

have testified in the BMG trial that they have this Copyright Alert System that tracks notices. We're happy to get the data set without getting the actual underlying notices to the extent that it has the relevant information. But we can't have that discussion when they claim that it's absolutely not relevant.

So, Your Honor, it goes not only to our liability claim, but it also goes to the statutory damages issues, Your Honor, and findings of willfulness.

THE COURT: Okay. Well, on this issue, I also think -- I mean, I have to deal with the motion that has been presented --

MR. OPPENHEIM: Can I add one point I left out?

THE COURT: Yeah.

MR. OPPENHEIM: Judge O'Grady actually spoke to this in some measure in the BMG case. In the BMG case there were exhibits of correspondence internally at Cox regarding notices that came from vendors other than Rightscorp, and Cox argued those aren't relevant. All that is relevant is that which arose from the Rightscorp notices. And Judge O'Grady said, no, that's not the case.

And I think that ruling is directly applicable to what we're looking for here. On the issue --

THE COURT: Well, what you're looking for here is every individual notice, not e-mails relating to the number of notices.

MR. OPPENHEIM: He wasn't -- the e-mails at issue were e-mails about specific notices from other vendors.

THE COURT: I, you know, was involved in the first case.

MR. OPPENHEIM: Absolutely, Your Honor.

THE COURT: I don't recall ordering that every copyright and notice that was ever sent to Cox be produced, and that that was an issue that Judge O'Grady would have been referring to when he made a comment about e-mails.

MR. OPPENHEIM: I'm not suggesting that that was the issue as it was joined. But the issue that came up were specific documents about notices that came from other vendors.

And the Court not only -- it wasn't a discovery -- it was an admissibility issue. The Court said, absolutely it's relevant. You go beyond just what Rightscorp said.

And that ruling applies here. It's not just the notices that are -- that Markmonitor, which is the vendor in this case, sent. It's all of the notices so we can do the analysis, so the jury can have the full picture of Cox's conduct with respect to notices.

THE COURT: All right. Well, on this issue, I think I also understand what the issue is. And I, again, have to deal with what the motion to compel is and what the discovery request is. And this is not a request to -- that is specific to those customers or subscribers who you sent notices to to

find out whether they had additional notices or other claims that they were infringing. This is every notice of infringement for a five-year period from anybody about any subscriber. And I think, you know, that asks for way too much information for an extended period of time.

And I know your claim period is February of 2013 to 2014. And, you know, if this was a motion relating to those subscribers that you have identified as to any other notices received from others, that's a different story.

If it was a motion dealing with the number in a generic sense of copyright notices or infringement notices, you know, that they received over a period, that's a different story.

But the motion to compel here is all notices relating to, you know, this issue for a five-year period of time. And I'm denying the motion to compel. I think it's overbroad. I think it is unduly burdensome. I think it is not proportional to the needs of the case as written.

Obviously, this is something that I've, you know, indicated that I would consider requiring them to possibly produce notices of infringement from other parties that are directly related to the claims in this case, but not every notice of infringement for a five-year period of time.

So, in essence, I'm granting the motion in part, denying the motion in part for the reasons I've stated from the

bench.

Okay? Thank you, counsel.

Court will be adjourned.

NOTE: The hearing concluded at 11:20 a.m.

C E R T I F I C A T E of T R A N S C R I P T I O N

I hereby certify that the foregoing is a true and accurate transcript that was typed by me from the recording provided by the court. Any errors or omissions are due to the inability of the undersigned to hear or understand said recording.

Further, that I am neither counsel for, related to, nor employed by any of the parties to the above-styled action, and that I am not financially or otherwise interested in the outcome of the above-styled action.

/s/ Norman B. Linnell
Norman B. Linnell
Court Reporter - USDC/EDVA